

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ATARI, INC.,
a Delaware corporation,

and

MIDWAY MFG. CO.,
an Illinois corporation,

Plaintiffs,

vs.

NORTH AMERICAN PHILIPS
CONSUMER ELECTRONICS CORP.,
a Tennessee corporation,

PARK TELEVISION d/b/a
PARK MAGNAVOX HOME
ENTERTAINMENT CENTER,
an Illinois partnership,

and

ED AVERETT,
an individual,

Defendants.

F I L E D

AUG 12 1983

Judge George N. Leighton
U. S. District Court

DOCKETED

AUG 15 1983

Civil Action No. 81 C 6434

The Honorable George N. Leighton

MOTION OF PLAINTIFF MIDWAY MFG. CO. FOR LEAVE
TO SUPPLEMENT THE RECORD

Plaintiff Midway Mfg. Co. moves for leave to supplement the record of the hearing on the MOTION OF PLAINTIFF MIDWAY MFG. CO. TO DISQUALIFY REUBEN & PROCTOR FROM REPRESENTING DEFENDANTS AND FOR OTHER RELIEF, held June 18, 1983, with the Affidavit of Amedee Edward Turner, submitted herewith (Exhibit A).

The grounds for this motion are as follows:

(1) At the June 18, 1983 hearing, an issue arose as to whether Amedee Turner, an English Barrister who attended the October 14th and 15th, 1982 meetings of the Amusement Game Manufacturers' Association (the "Association"), attended the

meetings as counsel to the Association or merely as a lecturer.

(2) In his Affidavit, Mr. Turner states that he attended the meetings at the request of his clients, the Association and Bally Manufacturing Corporation (Turner Aff. ¶1). He further states that he provided legal advice to the Association and considered all communications with the members and representatives to be confidential, "as is normal in the relationship of client and legal advisor" (Turner Aff. ¶2).

(3) The Turner Affidavit contradicts the testimony of David Maher that Mr. Turner was invited only to lecture to the Association and discuss his views on European and American copyright law (Tr. pp. 79-81, Exhibit B hereto). The Affidavit also contradicts the argument asserted by the Rueben firm that Mr. Turner's presence as a "stranger" destroyed whatever privilege may have existed at the meetings in question (Tr. p. 108, Exhibit C hereto). Lastly, and most importantly, the Affidavit undercuts the Reuben firm's assertions that Midway's counsel held no reasonable expectations of confidentiality at those meetings (Defendant's Proposed Findings, pp. 12, 14-15, Exhibit D hereto).

(4) Since the Turner Affidavit refutes testimony and arguments regarding the core issue in Plaintiff Midway's Motion for Disqualification, it is submitted that the record of the June 18, 1983 hearing should be supplemented by the addition of the Affidavit for the Court's consideration.

Respectfully,

DATED: August 10, 1983


A. Sidney Katz
Donald L. Welsh
Eric C. Cohen
Roger D. Greer
Jacqueline A. Leimer
WELSH & KATZ
135 S. LaSalle Street
Suite 1625
Chicago, Illinois 60603
(312) 781-9470

Counsel for Plaintiff, MIDWAY MFG. CO.

Dated 15th July 1983

A F F I D A V I T

- of -

AMEDEE EDWARD TURNER

I AMEDEE EDWARD TURNER of 1 Essex Court, Temple, London E.C.4.
MAKE OATH AND SAY as follows:-

1. I, a barrister at law, Queen's Counsel and Member of the European Parliament do solemnly and sincerely declare as follows:

On 14th and 15th October 1982 I visited Chicago at the request of my clients, the Amusement Games Manufacturers' Association (through their then attorney David Maher of Reuben and Proctor) and Bally Manufacturing Corporation. I consulted with technical representatives of members of the Association throughout the 14th of October at the offices of Reuben and Proctor at 19 South LaSalle Street, Chicago, Illinois 60603 and I further consulted a number of members of the Association and attorneys of members of the Association on the legal aspects of copyright protection in the EEC on the 15th of October.

2. On both these occasions I was giving the Association legal advice and receiving information from them of the factual situation to form the basis of my legal advice. Both my meetings and all the contents of my consultations with the members of the Association and their technical and legal representatives I considered to be confidential, as is normal in the relationship of client and legal adviser. The meetings were not public nor considered to be so by me.

3. Subsequently I gave written advice to the Association by letter to Reuben and Proctor of 3rd November 1982 as a consequence of my oral consultations with them.

4. During my stay in Chicago I also held separate consultations with my clients Bally Manufacturing Corporation at the premises of their Attorney, Mr Sidney Katz, at 135 South LaSalle Street, Chicago, Illinois 60603 on specific legal issues of concern to them in Britain.

SWORN at 15, Devonshire Court
Essex Street, London WC2
This 15th July, 1983

Before Me

...R. Crawley.....

A Solicitor of the Supreme Court

Amédée Turner

a group of counties in England. But his particular function, as I learned, he was the rapporteur of the European Trademark act. And he is the only member of the Parliament who is a lawyer in the intellectual property field.

Q Did you have a conversation with anybody at the Association about inviting Mr. Turner to the United States?

A Yes.

Q And who was that person?

A I discussed it with Glen Braswell.

Q When?

A Well, on several occasions.

Q When was the first?

A Probably in June, 1982, and then, until Turner appeared over here.

Q Well, what was the first discussion?

A Well, the first discussion was the question of bringing a European expert over to discuss questions of copyright, trademark, patent law with members of the Association, and I had suggested at a board meeting of the Association that I had a friend in England who would be ideal for this job. He could--he was a patent barrister and he knew the field.

Q Was he coming over as a lecturer, or a lawyer, or what?

A Well, as--he was coming primarily to lecture and



that-- the board, in September of 1982, approved the project of bringing him over to lecture to the members on the status of European law and the interrelationships of U. S. and European copyright law, in particular.

Q Did you ever, prior to October 14, 1982, have a conversation with Mr. Braswell concerning the employment as a lawyer of Mr. Turner?

A Yes. One of the conversations that I had with Braswell, I believe in September of 1982, concerned the problem of the Association dealing with the very person in the European Parliament who was drafting legislation. And I raised it by saying, in very blunt terms, we cannot be in the position of paying money to a government official who is going to be writing legislation. And I cautioned him that that would be a problem that we would have to deal with; but that I thought, after talking to Turner and thinking it over that we could bring him in simply to give his views and report to the committee--or report to the assembled meeting and discuss European and American copyright law.

Q Did you have a subsequent conversation, prior to October 14th, but after this one you just testified to?

A Well, Braswell and I spoke to each other frequently on the telephone and, as I recall, at some point, prior to the October meeting, I told Braswell that we could not hire Turner as the Association's lawyer. We would simply have

to treat him as a guest expert who would come to discuss, lecture, give his views.

Q To your knowledge, as he ever hired by the Association?

A Not to my knowledge.

Q Mr. Maher, on October 14th and 15th, do you believe that you received as a lawyer any confidential information from your client?

A As far as I am concerned, I received no confidences at all.

Q Mr. Katz, in his testimony, referred to a July 20th meeting or a July meeting, do you recall that?

A Yes, there was a meeting in July that was, in effect, a similar meeting, although the focus was on specifically the International Trade Commission and one of the participants was a government attorney from the ITC.

Q The U. S. government?

A The U. S. government attorney.

Q Another nonmember of the Association?

A That's correct.

MR. REUBEN: No further questions.

THE COURT: Cross examination?

CROSS EXAMINATION

BY MR. BODE:

Q Mr. Maher, you have, besides your antitrust role--you were the only counsel for the Association in May through

experience as a lawyer. And I am sure you remember that when you were a lawyer, every other lawyer you knew was very protective about his client. And I would guess that Mr. Katz is protective about his client. We are protective about ours. We sure do not want anybody else to be giving our client legal advice.

And so, Mr. Katz is not going to put himself in a position, as a matter of common sense, where he discloses anything that gives any special advantage to any other lawyer to go deal with his client.

In comes Mr. Turner, and I look upon Mr. Turner very much like how we have done so often, for example, in the broadcast business, for instance. They invite the Commissioners, the FCC Commissioners down to the National Broadcasting Convention. They pay their expenses. Or you invite a Congressman or a Senator to come and speak. You may even pay them an honorarium, which they did not do here, as well as his expenses. And, you can have an off the record meeting on what is happening in government or what an idiot Mr. Reagan is, or what an idiot the Democrats are or what have you; which is a private meeting. It is an unprivileged meeting.

Mr. Turner was a stranger in terms of--if there ever was a privilege--and I suggest there was not--clearly though there is no privilege when Mr. Turner shows up. You cannot have a privileged circumstance when you have a stranger.



actually participating in the meetings, i.e., subsidiary of the member, in determining whether there was a reasonable expectation of confidentiality and a reasonable belief that Mr. Maher was acting as the subsidiary's lawyer.

Also relevant to the question of reasonable expectation is the status of Mr. Amedee Turner. Mr. Katz testified that Mr. Turner was acting as counsel for the Association at the meetings. (Tr. 36-37 [Katz]) However, Mr. Katz' testimony was contradicted by that of Midway's witness, Glenn E. Braswell, Executive Director of the Association and a lawyer with experience in trade association matters (Tr. 57-58), who testified that Mr. Turner has never been retained by the Association. (Tr. 62-63) It was also contradicted by Mr. Maher, who testified that he had previously considered whether Mr. Turner could be retained by the Association, harbored serious doubts about whether payments to Mr. Turner would be consistent with the Foreign Corrupt Practices Act, and advised the Association not to retain him. (Tr. 80-81 [Maher]) Midway could not identify any resolution, minutes, or other Association documents evidencing Mr. Turner's retention as counsel, although it had access to the Association's files and such documentation would have existed had Mr. Turner been retained. Finally, the minutes of the association meeting (Plaintiff's Exhibit F) reflect an informal discussion of the state of the law, not communications made for the purpose of securing legal advice or the performance of legal services, and do not in any way indicate that Mr. Turner was acting as counsel to anyone. (Tr. 37-38 [Katz])

belief that there was a relationship of trust and confidence between Mr. Maher and Midway." (Plaintiff's Exhibit L, ¶¶12, 14; Tr. 27 [Katz])

The Court carefully observed Mr. Katz as he testified and it is the Court's view that Mr. Katz was trying very hard to make it appear from his testimony and his description of what went on in those two meetings that he was disclosing in the presence of Mr. Maher confidential information. The Court has listened very carefully to what it was that Mr. Katz revealed. The Court finds that none of it was confidential. It was ordinary matter about a lawsuit that any lawyer would talk about in the presence of other individuals, including lawyers -- even opposing lawyers. None of it was confidential. None of it was information that could not be obtained elsewhere, and Mr. Maher has denied under oath that he received any confidential information from Mr. Katz as general counsel of the Association. (Tr. 118)

The Court has also considered the circumstances of the meetings, particularly the format of the meetings, the presence of competitors and adverse parties to litigation, the ambiguous capacities in which Mr. Katz and others attended, the presence of Mr. Turner, and the lack of evidence which even suggests Turner was then acting or being considered as counsel for the Association. Mr. Katz, an attorney of 17 years' experience (Tr. 6 [Katz]), is charged with the knowledge that communications cannot be privileged if they are made in the presence of a stranger. Moreover, and of greater importance,

Mr. Keane, a senior executive of Mr. Katz' client, emphatically testified that he would never have provided any technical information to his competitors that was not readily available to them. (Tr. 74 [Keane]) It is incredulous to believe that Mr. Katz was no less circumspect. */

In sum, the Court cannot credit Midway's assertion that these meetings involved a professional relationship or were entitled to confidentiality. The Court finds from the evidence that the matters discussed on October 14-15, 1982 were not confidential, and that the Bally representatives did not entertain any belief that Mr. Maher was being entrusted with confidential information. **/

CONCLUSIONS OF LAW

The Court has already noted that the parties agree that the threshold question is whether Bally's representatives reasonably believed they were consulting and dealing with the

*/ Midway makes much of the fact that Mr. Maher said he would not have expected Mr. Turner to disclose what transpired at the meetings. (Tr. 82 [Maher]) That does not change Mr. Turner's status here. Thus, a domestic legislator who meets with a group interested in pending legislation for a frank exchange of views would not be expected to publicize what was said. But no one would believe that the legislator was acting as an attorney.

**/ Mr. Katz' affidavit (Plaintiff's Exhibit L) also referred (¶13) to a July, 1982 meeting at which Association members and their counsel discussed remedies available before the United States International Trade Commission. There clearly could have been no expectation of confidentiality with respect to that meeting because one of the participants was a Commission representative. (Tr. 28-29 [Katz]; Tr. 81 [Maher]) Citing this meeting is another example of the extent to which Midway would go to create a confidence where there was none.